The Pike Company *and* Bricklayers and Allied Craftsmen, Local No. 11, AFL–CIO, Petitioner. Case 3–RC–10124

August 4, 1994

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election issued on May 26, 1994. The request for review is granted as it raises substantial issues warranting review.

The sole issue presented is whether, in the construction industry, the numerical sufficiency of a petitioner's showing of interest should be measured against the number of unit employees employed at the time the petition is filed, or against the number of employees eligible to vote under the special construction industry eligibility formula set forth in *Steiny & Co.*, 308 NLRB 1323 (1992), reaffirming *Daniel Construction Co.*, 133 NLRB 264 (1961). The Regional Director rejected the Employer's argument that the appropriate standard for measurement was the total number of employees eligible under the *Steiny/Daniel* formula,[1] and found that the appropriate standard for determining numeric sufficiency was the number of unit employees employed at the time the petition is filed.[2] We agree with the Regional Director.

The Regional Director correctly found that to base the showing-of-interest requirement on the number of all employees eligible under the *Steiny/Daniel* formula would place an almost impossible burden on petitioners in the construction industry, as the petitioners would have to track down individuals who may have worked for a construction industry employer within the prior 2 years to determine if the employees worked for a sufficient period of time to be eligible to vote under the formula, and then to procure authorization cards from such employees. These individuals most likely would be unknown to the petitioner, or to current employees, and may have moved to distant locales. We agree with the Regional Director that given the unique nature of the construction industry,[3] tracking down such individuals would be a difficult and burdensome task. As we have stated previously, the construction industry is characterized by intermittent employment of an unpredictable duration and often involving several employers.[4]

Another impediment to the standard urged by the Employer is that unlike the usual employment setting where the number of employees in a petitioned-for unit can be determined easily, a petitioner for a unit of construction industry employees most likely would not know when it files its petition the number of employees who ultimately will be found eligible to vote under *Steiny/Daniel*, and thus would have no way of knowing the number of cards needed to support the petition. A petitioner, therefore, would be at a distinct disadvantage in obtaining a sufficient showing of interest. In this regard, we note that an employer is under no obligation prior to issuance of the Regional Director's decision directing compliance with *Excelsior Underwear*,[5] to supply a petitioner with a list of eligible employees.

Requiring that the showing of interest be checked against all eligible voters under the *Steiny/Daniel* formula also would be a burden on the Board's Regional Offices and on employers. The Regional Offices would have to determine eligibility under the *Steiny/Daniel* formula well in advance of the election, on the filing of a petition, and prior to directing a hearing. There also likely would be frequent disputes regarding who is ''eligible'' to be counted for purposes of the showing of interest. The showing of interest, however, is an administrative matter which is not subject to litigation. *O. D. Jennings & Co.*, 68 NLRB 516, 517 (1946). Employers not only would have to submit a payroll list of current employees, but presumably supporting documentation to establish that the laid-off employees on the list are eligible. Moreover, employers often would be required to prepare and submit two different lists of eligible voters under the *Steiny/Daniel* formula—one when the petition is filed, and another when (and if) a direction of election is issued.

Under the above scenario, the burdens placed on the parties and the Board may prove to be more time-consuming and costly than simply running the election. In this regard, the purpose of the showing-of-interest requirement is to save the time and needless expense of conducting an election where there is insufficient employee interest in the representation issue; it is not intended to determine if the employees ultimately desire

[1] The Regional Director found appropriate a unit of all bricklayers employed by the Employer at its Monroe County jobsites, including those employees eligible under the *Steiny/Daniel* formula. No request for review was filed with respect to the scope or composition of the unit.

[2] In so finding, the Regional Director relied on an unpublished order in *Delta Diversified Enterprises*, Case 28–RC–5161 (1993), in which the Board majority (then-Chairman Stephens and Member Devaney; Member Raudabaugh dissenting) denied the employer's request for review of a Regional Director's application of the same showing-of-interest standard.

[3] See *Steiny & Co.*, 308 NLRB at 1324–1325, and cases cited therein.

[4] Id.

[5] 156 NLRB 1236 (1966). See also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

representation, which is the purpose of the election. See *S. H. Kress & Co.*, 137 NLRB 1244, 1248 (1962). A broadened showing-of-interest requirement in cases involving eligibility under the *Steiny/Daniel* formula would undermine the limited purpose of that showing-of-interest requirement.[6]

Moreover, in at least one other industry with a fluctuating work force and intermittent employment, the Board has rejected measuring the adequacy of the showing of interest against all employees eligible under a special formula. In *Hondo Drilling Co.*, 164 NLRB 416 fns. 5 and 10 (1967), enfd. 428 F.2d 943 (5th Cir. 1970), the Board fashioned an eligibility formula for oil drilling employees. The Board rejected the employer's motion that the petitioner file a new showing of interest because the unit had been expanded by the eligibility formula. The Board found that the showing of interest among the employees employed ''at the time the petition was filed'' was adequate, and that it would be ''patently unjust'' to require a showing of interest in the unit expanded by the formula. Id. at fn. 10.

We agree with the Regional Director that to broaden the showing-of-interest requirement as urged by the Employer may, for the reasons we have discussed, ultimately frustrate the purposes of the Act by severely restricting construction industry employees in the exercise of their rights under Section 7 of the Act. Accordingly, we find that the Board's resources can best be utilized to effectuate the Act by requiring that the sufficiency of the showing of interest supporting petitions filed for units of construction industry employees be determined based on the number of employees in the unit at the time the petition is filed.[7]

ORDER

The Regional Director's Decision and Direction of Election is affirmed, and the case is remanded to the Regional Director for further appropriate action.

[6] We reject the Employer's argument that the application of this standard is contrary to Sec. 101.18 of the Board's Statements of Procedure, and that it is illogical to apply different standards to the showing-of-interest requirement and the eligibility formula. The standard we affirm today is consistent with the Sec. 101.18 requirement that a petitioner submit a numerically adequate (normally 30 percent) showing of interest (e.g., valid cards), measured against the number of employees. We here interpret the term ''employees'' in Sec. 101.18 as those actually working in the unit at the time the petition is filed. For the reasons set forth in this opinion, we believe that this standard is both logical and reasonable in an industry characterized by a fluctuating work force. The showing-of-interest requirement is an administrative expedient adopted by the Board to determine if further proceedings are warranted, and it is important that the rule in fact serve to facilitate that goal and not to prolong and complicate the procedures it is intended to expedite. The eligibility formula, however, serves an entirely different purpose—that of determining who may vote if an election is held. Because the purpose behind the two rules are distinct, the groups of employees on which they focus need not be identical.

[7] Since we find that the currently employed work force is the appropriate measure of the numerical sufficiency of the showing of interest, valid cards will be acceptable only from employees within that group. To permit the counting of cards from individuals eligible solely under the *Steiny/Daniel* formula would be inconsistent with our reasons for not measuring the showing of interest against the number of *Steiny/Daniel* eligible voters; i.e., that an undue burden would be placed on the Board and parties to determine who is eligible under the formula at an early stage of the proceeding.